No. 88-255

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARREN GARRETT,

Petitioner,

VS.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a Title VII plaintiff's suit be barred by the application of laches, where there has been a prior judicial finding that plaintiff's discharge violated Title VII, and any potential prejudice suffered by the defendant because of the delay is therefore irrelevant?

2. Does a Title VII complainant's decision to await the completion of the EEOC's administrative processing of his charge to request his Right to Sue letter constitute "lack of diligence" or "inexcusable delay" that would support a defense of laches?

3. Whether Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) mandate that the application of laches due to a Title VII plaintiff's

delay in bringing suit should result in a limitation on relief rather than dismissal of the action, where there is no evidence that the plaintiff intentionally delayed the administrative process.

PARTIES TO THE PROCEEDING

All the parties are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	16
I. THE DECISION BELOW THAT A TITLE VII COMPLAINANT'S TIMELY FILED SUIT CAN BE BARRED BY LACHES CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND APPEARS TO IMPLICATE PRIOR DECISIONS OF THIS COURT.	16

Page

II. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE REGARDING TITLE VII PLAINTIFFS' RIGHTS AND RESPONSIBILITIES AND AS TO THE ALLOCATION OF THE BURDEN OF DELAYED ENFORCEMENT OF TITLE VII BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHICH SHOULD BE RESOLVED BY THIS COURT 33

CONCLUSION 42

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . . . . . i, 26

Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), on rehearing en banc, 619 F.2d 459 (5th Cir. 1980), aff'd, 452 U.S. 89 (1981) 17, 31

Bethel v. Jefferson, 589 F.2d 631 (D.C. Cir. 1978) 26

Birge v. Delta Airlines, 597 F. Supp. 448 (D.C. Ga. 1984) 27

Bishop v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986) 27

Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979) 17, 31, 39

Bratton v. Bethlehem Steel Corp., 649 F.2d 658 (9th Cir. 1980) 30

Breeding v. S. Louis & San Francisco Ry. Co., 33 F.E.P. Cases 1514 (D.C. Ala. 1977) 32

Page

Cases

Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985) 17, 27, 35

Cleveland Newspaper Guild v. The Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir. 1988)(en banc), petition for cert. filed, 56 U.S.L.W. 3806 (No. 87-1864) . 17, 35, 40, 41

E.E.O.C. v. Alioto Fish Co., Ltd., 623 F.2d 86 (9th Cir. 1980) 24

E.E.O.C. v. American Petrofina Co. of Texas, 22 F.E.P. Cases 1321 (D.C. Tex. 1977) 25

E.E.O.C. v. Beaver Welding Supply Co., 21 F.E.P. Cases 152 (D.C. Tenn. 1979) 25

E.E.O.C. v. Bethlehem Steel Corp., 36 F.E.P. Cases 1083 (D.C. Md. 1984) 23

E.E.O.C. v. Bray Lumber Co., 478 F. Supp. 993 (D.C. Ga. 1979) 25

E.E.O.C. v. Celotex Corp., 27 F.E.P. Cases 324 (D.C. Tenn. 1980) 24

Page

Cases

E.E.O.C. v. Commonwealth Oil Refining Co., 33 F.E.P. Cases 764 (D.C. Tex. 1982), reversed and remanded on other grounds, 720 F.2d 1383 (5th Cir. 1983). 24

E.E.O.C. v. Dresser Industries, Inc., 668 F.2d 1199 (11th Cir. 1982) 24

E.E.O.C. v. Firestone Tire & Rubber Co., 626 F. Supp. 90 (D.C. Ga. 1985) 23

E.E.O.C. v. Great Atlantic & Pacific Tea Co., 735 F.2d 69 (3rd Cir. 1984) 23

E.E.O.C. v. Indiana Bell Telephone Co., 641 F. Supp. 115 (D.C. Ind. 1986) 23

E.E.O.C. v. Kelley Manufacturing Co., 29 F.E.P. Cases 243 (D.C. Ala. 1979) 25

E.E.O.C. v. K-Mart Corp., 694 F.2d 1055 (6th Cir. 1982) 24

E.E.O.C. v. Local 638, Etc., Sheet Metal Workers' International Association, 753 F.2d 1172 (2nd Cir. 1985) 23

Page

Cases

E.E.O.C. v. Martin Processing, Inc., 533 F. Supp. 227 (D.C. Va. 1982) 24

E.E.O.C. v. Massey-Ferguson, Inc., 622 F.2d 271 (7th Cir. 1980) 24

E.E.O.C. v. Pacific Press Publishing Assn., 34 F.E.P. Cases 1165 (D.C. Calif. 1981) 24

E.E.O.C. v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979) 25

E.E.O.C. v. Shell Oil Corp., 466 U.S. 54 (1984) 18, 22

E.E.O.C. v. Star Tool & Die Works, 47 F.E.P. Cases 39 (E.D. MI 1987) 23

E.E.O.C. v. Times Mirror Magazine, Inc., 42 F.E.P. Cases 499 (D.C.N.Y. 1986) 23

E.E.O.C. v. Wayside World Corp., 646 F. Supp. 86 (D.C. Va. 1986) 23

EEOC v. Shell Oil Co., 466 U.S. 54 (1984) . . . . . *, *

Fields v. Hoerner Waldorf Corp., 33 F.E.P. Cases 1471 (D.C. Ala. 1980) 30

Page

Cases

Fowler v. Blue Bell, Inc., 596 F.2d 1276 (5th Cir. 1979), cert. denied, 444 U.S. 1018 (1980) 31

Fridy v. Moultrie, 595 F. Supp. 34 (D.C. D.C. 1984) 27

Gifford v. Atchinson, Topeka & Santa Fe Ry., 685 F.2d 1149 (9th Cir. 1982) 17, 27

Harris v. Ford Motor Co., 487 F. Supp. 429 (D.C. Mo. 1980), judgment for employer affirmed, 651 F.2d 609 (8th Cir. 1981) 30

Holden v. Burlington Northern, Inc., 36 F.E.P. Cases 798 (D.C. Minn. 1984) 28

Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985) 17, 28

Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984) 17

Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986) 17, 27, 34, 35

Page

Cases

Johnson v. Angelica Uniform Group, 36 F.E.P. Cases 85 (D.C. Mo. 1984) 28

Lacy v. Chrysler, 533 F.2d 353 (8th Cir. 1976) (en banc), cert. denied, 429 U.S. 959 11

McLemore v. Interstate Motor Freight System, Inc., 33 F.E.P. Cases 1384 (D.C. Ala. 1984) 28

Mosley v. General Motors Corporation, 10 F.E.P. Cases 1442 (E.D. Mo. 1975) 8

Mosley v. General Motors Corporation, 497 F.Supp. 583 (E.D. Mo. 1980), aff'd, 691 F.2d 504 (8th Cir. 1982) 5, 7-9, 12, 13

Nickel v. Highway Industries, Inc., 441 F. Supp. 477 (D.C. Wis. 1977) 32

Nilsen v. City of Moss Point, Mississippi, 621 F.2d 117 (5th Cir. 1982) 29

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) . . i, 18-21, 26, 36, 38

Page

Cases

Pande v. Johns Hopkins University, 598 F. Supp. 1084 (D.C. Md. 1984) 28

Patzer v. University o Wisconsin System, Board of Regents, 577 F. Supp. 1553 (D.C. Wis. 1984) 29

Pegues v. Morehouse Parrish School Board, 706 F.2d 735 (5th Cir. 1983) 29

Richardson v. Delta Drayage Co., 433 F. Supp. 50 W.D. La. 1977) 32

Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983) 17, 29

Sangster v. United Airlines, 633 F.2d 864 (9th Cir. 1980) 30

Schwabenbauer v. Board of Education, City School Dist., City of Olean, 25 F.E.P. Cases 767 (D.C. N.Y. 1978), vacated & remanded, 667 F.2d 305 (2nd Cir. 1981) 31

Stallworth v. Monsanto Co., 21 F.E.P. Cases 364 (D.C. Fla. 1979) 31

Cases

Page

Staples v. Avis-Rent-A-Car System, Inc., 537 F. Supp. 1215 (D.C.N.Y. 1982) 29

Stasney v. Southern Bell Telephone & Telegraph Co., 458 F. Supp. 314 (D.C. N.C. 1978), affirmed in part, remanded in part, 628 F.2d 267 (4th Cir. 1986) 31

Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125 (6th Cir. 1971) 26

Tuft v. McDonnell-Douglas Corporation, 517 F.2d 1301 (8th Cir. 1975), cert. denied, 423 U.S. 1052 (1976) 11

Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3rd Cir. 1986) . . . 25, 27

White v. Washington Metropolitan Area Transit Authority, 32 F.E.P. Cases 1014 (D.C. D.C. 1981) 29

Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987) 17, 27

Page

Cases

Worley v. Western Electric Co., 26 F.E.P. Cases 1708 (D.C. Ga. 1981) 30

Statutes

28 U.S.C. §1254(1) 2

42 U.S.C. § 2000e-5(a) 22

42 U.S.C. § 2000e-5(f)(1) 40

Age Discrimination Claims Assistance Act of 1988, P.L. 100-283 39

Age Discrimination In Employment Act, 29 U.S.C. § 621 et seq. 39

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. . 3, 5-7, 15-18, 21, 22, 25, 26, 32-34, 36, 38, 41

Other Authorities

19th Annnual Report of the Equal Employment Opportunity Commission 39

118 Cong. Rec. 7168 (1972) 21

H.R. 1746, 92d Cong., 1st Sess., §8(j)(1971) reprinted in H.R. Rep. No. 92-338, p.12, Committee Report 20

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WARREN GARRETT,

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vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Warren Garrett, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 14, 1988.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 844 F.2d 559 (8th Cir.

1988) and is set out in the Appendix to this petition at pp. 1a-14a. The order of the court of appeals denying rehearing is set out in the Appendix at p. 15a. The opinion of the district court is reported at 657 F. Supp. 1273 (E.D. Mo. 1987) and is set out in the Appendix at pp. 16a-41a.

JURISDICTION

The judgment of the Court of Appeals was filed April 14, 1988. (A.1a.) A petition for rehearing was filed and was denied May 20, 1988, and this petition for a writ of certiorari is filed within 90 days of that date. (A. 15a.) Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., which is set out in relevant part in the Appendix at pp. 42a et seq.

STATEMENT OF THE CASE

The petitioner, Warren Garrett, a black man, was employed by General Motors Corporation at its St. Louis, Missouri plant from May, 1967 until his discharge on March 29, 1971. On March 16, 1971, plaintiff left the plant during his lunch hour to attend a Congress On Racial Equality (CORE) rally across the street from the plant. He returned to work late, and as a result, was suspended from work for 30 days. (Transcript of Trial ("T.") 21-23) On March 23, 1971, while on disciplinary suspension, Garrett participated in a wildcat strike at the

plant, led by CORE, to protest G.M.'s allegedly racially discriminatory work policies. Garrett, along with twenty-five other G.M. employees, was discharged because of his participation in the wildcat, and a total of one hundred twenty-five black G.M. employees were disciplined. After the settlement of union grievances, six employees remained discharged, including Garrett. Garrett testified at trial that he tried to file a union grievance on his discharge, but that the union refused to accept it. Shortly after his discharge Garrett left St. Louis because he was unable to find work. (T. 34-35)

Several other G.M. employees who were discharged because of their participation in the CORE demonstrations and rallies filed suit against General Motors in the federal district court in

St. Louis." In Mosley v. General Motors Corporation, 497 F.Supp. 583 (E.D. Mo. 1980), aff'd, 691 F.2d 504 (8th Cir. 1982), the district court held that G.M.'s discharge of the plaintiffs in Mosley violated Title VII because the black employees who participated in the March, 1971 wildcat strike protesting alleged racially discriminatory conditions at G.M.'s St. Louis plant were disciplined more harshly than white employees participating in other wildcat strikes. The facts of the Mosley case were the same as the facts in the present case; the Mosley plaintiffs were discharged at the same time that Garrett was discharged, and as a result of the same conduct. The district court in the present case held that "the Mosley case establishes as a matter of law that defendant's discharge of plaintiff on

March 29, 1971, was in violation of Title VII." (Appendix 32a.) The court of appeals acknowledged the district' court's finding that the discharge violated Title VII.

Prior to his discharge, in September 1970, Garrett had filed a grievance with his union regarding racially discriminatory conditions at G.M.'s St. Louis plant. On October 8, 1970, his charge of discrimination was received by the Kansas City District Office of the Equal Employment Opportunity Commission (EEOC). After deferment to the state agency, the charge was deemed filed with the EEOC on December 22, 1970. Shortly after his discharge in March, 1971, Garrett returned to the EEOC and notified them of his discharge, which was made a part of his pending charge. (T. 33-34)

According to the EEOC's ledger card on Garrett's charge, on May 25, 1971, the St. Louis district office issued a determination of "reasonable cause" on plaintiff's EEOC charge. On August 10, 1972, conciliation efforts with G.M. failed. On February 2, 1973, Garrett's EEOC file was forwarded to the EEOC's regional Litigation Center in Chicago, Illinois, to be considered for litigation by the EEOC, pursuant to the 1972 amendments to Title VII. (T. 135, 174) There was testimony at trial that there were delays between the effective date of the 1972 amendments and the opening of the litigation center in 1973. (T. 174, 185, 228).

In early 1974, counsel for the plaintiffs in the pending Mosley case requested that the EEOC release to plaintiffs' counsel the names of all

persons who had filed charges like and related to the charges filed by the named plaintiffs in Mosley[1]; a subpoena seeking the same information was later served on EEOC.[2] (T. 122-123)

The files sought by subpoena were not located in the St. Louis District Office at the time the subpoena was served, however, because all EEOC files from all district offices on cases against General Motors had been shipped to EEOC headquarters in Washington, D.C. in 1973 or 1974 (T. 124-25, 135-36, 143, 174), to be considered in connection with

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[1] The Mosley case was filed as a class action; the information sought by subpoena was intended to enable the named plaintiffs to identify other potential members of the class. Mosley v. General Motors Corporation, 10 F.E.P. Cases 1442 (E.D. Mo. 1975).

[2] The individual who was District Counsel for the St. Louis District Office of the EEOC at the time of the request and the subpoena, and who responded to both, testified at the trial of this matter.

an EEOC Commissioner's charge against G.M. nationwide. (T. 174.) Upon request of the St. Louis District Counsel, those files "like and related" to those of the Mosley plaintiffs were shipped to St. Louis and held in the District Counsel's office (T. 127, 135-136), where they remained from some time in 1974 until the end of 1975, about six months after the district court in the Mosley case ordered that the EEOC was not required to produce the files for Mosley counsel. See, Mosley, 10 F.E.P. Cases 1442 (E.D. Mo. 1975). (T. 224)

The Garrett file was among those that were shipped to the St. Louis District Counsel of the EEOC in connection with the Mosley subpoena and kept in her office (T. 127); the Garrett file had previously been determined to be "unsuitable" for the EEOC Commissioner's

national charge against G.M. (T. 144) The EEOC's Litigation Center in Chicago did not determine whether or not the EEOC would file suit on the Garrett charge before the file was sent to Washington, D.C., nor was any such determination ever made on the charge. (T. 136, 137, 142, 143, 153, 155-56.) The file was never sent back to Chicago.

In March, 1976, the Garrett files was sent to the Federal Records Center, for eventual disposal (T. 138), without ever being closed by the EEOC. (T. 156, 173.) Witnesses from the EEOC testified at trial that based on their knowledge of the events and the EEOC procedures, and based on the EEOC ledger cards on the charge, the file was sent to the Federal Records Center in error. (T. 137-38, 143, 153-54, 157.) They testified that they had concluded that Garrett was never

sent a Right to Sue letter prior to sending him a Right to Sue letter in July, 1985. (T. 128-40, 153-57, 223-24.) Although the EEOC changed its procedures on Right to Sue letters after the decisions of the Eighth Circuit Court of Appeals in Lacy v. Chrysler, 533 F.2d 353 (8th Cir. 1976) (en banc), cert. denied, 429 U.S. 959 and Tuft v. McDonnell-Douglas Corporation, 517 F.2d 1301 (8th Cir. 1975), cert. denied, 423 U.S. 1052 (1976), the new procedures were prospective only, and the St. Louis District Counsel was specifically directed not to go back to prior "conciliation failure" charges, such as the Garrett charge, to issue Right To Sue letters. (T. 131-132, 140, 233-24.) Garrett's charge never went beyond the first letter of the EEOC's two-letter system (T. 149, 167, 176-77), and the

EEOC did not send charging parties notice that their files were being sent to the Federal Records Center for disposal. (T. 186, 204.)

Garrett testified that after he moved to Decatur, Illinois in 1972, he contacted the EEOC through phone calls and visits to the EEOC office in St. Louis on at least a yearly basis. He did not know the names of anyone at the EEOC that he spoke with. He specifically testified that he contacted the EEOC about his charge in late 1980, after learning that the Mosley plaintiffs had won their case, and in 1983 after receiving a copy of a newspaper article about a National Conciliation Agreement settling the EEOC Commissioner's charge against General Motors. (See pp. 8-9 supra.) A supervisory employee at the EEOC testified at trial that when he

first spoke with Garrett in 1983, and attempted to find out the status of Garrett's charge, he found a problem with the EEOC's records on the charge (T. 182); the EEOC subsequently determined that no prior Right to Sue letter had been issued and issued one in July, 1985. Suit was timely filed within 90 days of Garrett's receipt of the Right to Sue letter.

The Mosley litigation was ongoing until 1982, when the Eighth Circuit affirmed the district court's judgment for the plaintiffs. Mosley, supra, 691 F.2d 504 (8th Cir. 1982). The EEOC's national programs case against General Motors, filed in 1973, was not resolved until 1983 (Pl. Exh. 27), and the scope of the settlement was still being negotiated in the years 1983-85. (T. 184-85, 191.)

The district court held that Garrett's suit was barred by the application of laches, despite the fact that Garrett had not affirmatively caused any of the EEOC's delay in processing his charge, and despite the fact that there was overwhelming evidence at trial that the EEOC had destroyed Garrett's file without ever sending him a Notice of Right to Sue, and that the EEOC had misinformed Garrett about the status of his case. There was no evidence or finding that Garrett had affirmatively caused any of the delay, only a determination that although he had made some inquiry to the EEOC about his charge, it was insufficient.[3]

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[3] The respondent here has agreed that the period of time from late 1983 and until plaintiff filed suit in September, 1985 should not be counted for laches purposes. In late 1983, when the EEOC discovered that Garrett's file had

(continued...)

The court of appeals affirmed the district court's determination. The court of appeals did not address or rule on plaintiff's contention that the defense of laches should be held to be inapplicable where a defendant has been found to be collaterally estopped from contesting its liability under Title VII by a prior finding of discrimination. The court of appeals also failed to address or rule on plaintiff's contention that the application of laches in a Title VII action which has been filed within the 90 day statutory period should be limited to the question of backpay, rather than barring plaintiff's entire

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[3](...continued)
been destroyed without being closed, the EEOC advised Garrett to wait to request a Right to Sue letter until it determined whether his case should be included in the National Conciliation Agreement being negotiated with G.M. in connection with the EEOC Commissioner's national charge against G.M. (T. 184-85).

cause of action.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW THAT A TITLE VII COMPLAINANT'S TIMELY FILED SUIT CAN BE BARRED BY LACHES CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND APPEARS TO IMPLICATE PRIOR DECISIONS OF THIS COURT.

The Eighth Circuit's decision that a Title VII complainant's timely filed suit can be barred by laches places that court squarely amidst a conflict among the circuits on this issue. The Fourth, Fifth, Ninth, Eleventh, and District of Columbia Circuits have held that a Title VII complainant's decision to await the completion of the EEOC's processing of his charge prior to filing suit does not constitute lack of diligence or inexcusable delay that would support a

defense of laches.[4] The Sixth, Seventh, and Eighth Circuits have held, to the contrary, that a Title VII complainant does not have an absolute right to await the completion of EEOC processing of his charge of discrimination.[5] The circuits

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[4] Holsey v. Armour & Co., 743 F.2d 199, 211 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985). Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), on rehearing en banc, 619 F.2d 459 (5th Cir. 1980), aff'd, 452 U.S. 89 (1981). Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984). Gifford v. Atchinson, Topeka & Santa Fe Ry., 685 F.2d 1149 (9th Cir. 1982). Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985). Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983).

[5] Cleveland Newspaper Guild v. The Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir. 1988)(en banc), petition for cert. filed, 56 U.S.L.W. 3806 (No. 87-1864). Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986). Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987). In Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979), the Ninth Circuit held that where a Title VII complainant knowingly declined the EEOC's offer to issue a Right to Sue letter and to help

(continued...)

holding that a complainant can await the completion of EEOC processing rely on both the legislative history of Title VII, and on this Court's decisions in Occidental Life Insurance Co. v. EEOC, 432 U.S. 335 (1977), Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), and E.E.O.C v. Shell Oil Co., 466 U.S. 54 (1984). The foregoing opinions of this Court are indeed implicated by the decision of the Eighth Circuit.

In Albermarle, supra, the Court considered the district court's denial of back pay relief in a Title VII case where the request for back pay relief was not made by the plaintiffs until five years after the suit was filed. The Court stated, "back pay should be denied only for reasons which, if applied generally,

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[5](...continued)
the complainant find counsel, the suit could be barred by laches.

would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. In discussing the balancing of equities on the award of back pay relief, the Court held that an employer's conduct need not have been in bad faith to justify an award of back pay, but that where there has been bad faith, the employer can "make no claims whatsoever on the Chancellor's conscience." Id., at 422. In the present case, G.M.'s liability has been proven, and G.M. can have no claim on the Chancellor's conscience for relief in the form of the application of laches.

In Occidental Life, supra, this Court considered whether the EEOC should be placed under judicially imposed time restraints in bringing enforcement suits,

and discussed the federal policy underlying the primary reliance on EEOC enforcement. The Court recognized both the "federal policy requiring employment discrimination claims to be investigated by the EEOC and whenever possible administratively resolved" and "the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities," Occidental Life, supra, 432 U.S. at 368. The Court held that judicially imposed time limits on EEOC enforcement suits were unwarranted. The Court discussed at length the amendments giving the EEOC enforcement power, Id. at 363 (citing H.R. 1746, 92d Cong., 1st Sess., §8(j)(1971) reprinted in H.R. Rep. No. 92-338, p.12, Committee Report), and stated that the individual suit option was necessary, because of the heavy case

load of the EEOC, to avoid lengthy delays to the aggrieved person, but was to be the exception and not the rule. Occidental, supra, at 365-66, citing 118 Cong. Rec. 7168 (1972).

The Court also held in Occidental Life that a limitation on the relief available rather than dismissal of the action was the proper remedy for inordinate delay by the EEOC. The Court described the procedural protection for a Title VII respondent, under which a respondent has notice of a charge 10 days after it is filed, Occidental, supra, at 372, and noted that a respondent is notified of the progress of a charge during its pendency. Id. at 372. The court then stated:

> It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate

> EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise, the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny back pay relief. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-425, 95 S.Ct. 2362, 2374-2375, 45 L.Ed.2d 280. The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," ibid., can also be exercised when the EEOC is the plaintiff.

Id., at 373. In E.E.O.C. v. Shell Oil Corp., 466 U.S. 54 (1984) the Court reiterated that "primary responsibility for enforcing Title VII has been entrusted to the EEOC." Id., at 61-62 (citing 42 U.S.C. § 2000e-5(a).

The decisions of this Court clearly indicate that the remedy for EEOC delay in bringing an EEOC enforcement action that results in prejudice to the employer should be a limitation on relief rather

than dismissal of the action.[6] The same

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[6] Despite the clear import of this court's decisions, the lower courts have continued to analyze EEOC delay in terms of traditional laches analysis:

E.E.O.C. v. Star Tool & Die Works, 47 F.E.P. Cases 39 (E.D. MI 1987)(EEOC suit barred by 7 1/2 year delay from filing of charges, although 4 1/2 years of the delay was not unreasonable).

E.E.O.C. v. Indiana Bell Telephone Co., 641 F. Supp. 115 (D.C. Ind. 1986)(case dismissed; 5 years, 4 month delay in filing suit after failure of conciliation).

E.E.O.C. v. Times Mirror Magazine, Inc., 42 F.E.P. Cases 499 (D.C.N.Y. 1986).

E.E.O.C. v. Wayside World Corp., 646 F. Supp. 86 (D.C. Va. 1986).

E.E.O.C. v. Firestone Tire & Rubber Co., 626 F. Supp. 90 (D.C. Ga. 1985).

E.E.O.C. v. Local 638, Etc., Sheet Metal Workers' International Association, 753 F.2d 1172 (2nd Cir. 1985).

E.E.O.C. v. Bethlehem Steel Corp., 36 F.E.P. Cases 1083 (D.C. Md. 1984)(EEOC enforcement suit barred due to 5 year delay).

E.E.O.C. v. Great Atlantic & Pacific Tea Co., 735 F.2d 69 (3rd Cir. 1984)(EEOC did not unreasonably delay).

(continued...)

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[6](...continued)

E.E.O.C. v. Commonwealth Oil Refining Co., 33 F.E.P. Cases 764 (D.C. Tex. 1982)(employer permitted to raise the defense), reversed and remanded on other grounds, 720 F.2d 1383 (5th Cir. 1983).

E.E.O.C. v. Dresser Industries, Inc., 668 F.2d 1199 (11th Cir. 1982)(5 year 8 month delay justifies dismissal on laches grounds, where employer demonstrated prejudice).

E.E.O.C. v. K-Mart Corp., 694 F.2d 1055 (6th Cir. 1982)(EEOC not guilty of laches in a mandamus action).

E.E.O.C. v. Martin Processing, Inc., 533 F. Supp. 227 (D.C. Va. 1982)(delay of 4 years 5 months after filing of charge is unreasonable)[28 F.E.P. 1825].

E.E.O.C. v. Pacific Press Publishing Assn., 34 F.E.P. Cases 1165 (D.C. Calif. 1981)(EEOC suit not barred by laches; 5 1/1 year delay).

E.E.O.C. v. Alioto Fish Co., Ltd., 623 F.2d 86 (9th Cir. 1980)(suit barred by laches, 62 month delay).

E.E.O.C. v. Celotex Corp., 27 F.E.P. Cases 324 (D.C. Tenn. 1980)(EEOC suit not barred).

E.E.O.C. v. Massey-Ferguson, Inc., 622 F.2d 271 (7th Cir. 1980)(reversing and

(continued...)

rationale should apply to private Title VII actions as well. See, Waddell v. Small Tube Products, Inc., 799 F.2d 69, 81 (3rd Cir. 1986).

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[6](...continued)
remanding determination that suit was barred by laches where district court did not make findings on prejudice to employer).

E.E.O.C. v. Beaver Welding Supply Co., 21 F.E.P. Cases 152 (D.C. Tenn. 1979)(employer not entitled to pre-trial dismissal on grounds of laches; 2 year delay).

E.E.O.C. v. Bray Lumber Co., 478 F. Supp. 993 (D.C. Ga. 1979)(dismissal of EEOC suit due to 4 year 5 month delay)[21 F.E.P. Cases 510].

E.E.O.C. v. Kelley Manufacturing Co., 29 F.E.P. Cases 243 (D.C. Ala. 1979)(EEOC suit barred; 7 year delay).

E.E.O.C. v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979)(17 month delay between filing of charge and EEOC's notice to employer does not warrant dismissal of action).

E.E.O.C. v. American Petrofina Co. of Texas, 22 F.E.P. Cases 1321 (D.C. Tex. 1977)(EEOC suit barred; 3/1/2 year delay after reasonable cause finding).

Where EEOC delay causes a private litigant to delay filing suit, the policy considerations discussed in Occidental Life and Albemarle are implicated even more strongly, because a Title VII complainant usually proceeds pro se at the administrative level. See, Bethel v. Jefferson, 589 F.2d 631, 642 (D.C. Cir. 1978); Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125, 129 (6th Cir. 1971). As has been noted, the circuit courts have been divided on the application of laches to bar a private Title VII action.[7] The question of the application of laches in private Title VII actions has provoked a substantial amount of litigation, with a wide range of results[8] indicating that this Court's

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[7] See notes 4 and 5, supra.

[8] The application of laches in a Title VII action has been addressed in (continued...)

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[8](...continued)
the following cases, among others:

Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987).

Bishop v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986)(8 year delay not unreasonable where employees were proceeding pro se).

Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3rd Cir. 1986)(laches barred back pay relief, but did not require dismissal of claim).

Brown v. Continental Can Corp., 765 F.2d 810 (9th Cir. 1985).

Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985) cert. denied, 475 U.S. 1050 (1986).

Birge v. Delta Airlines, 597 F. Supp. 448 (D.C. Ga. 1984).

Fridy v. Moultrie, 595 F. Supp. 34 (D.C.D.C. 1984)(employee's suit filed 9 years after denial of promotion barred by laches despite EEOC's inadequate and confused responses to her repeated inquiries where, among other factors, employer did not receive notice of the charge from EEOC for 6 years).

Gifford v. Atchison, Topeka & Santa Fe Ry. Co., 685 F.2d 1149 (9th Cir. 1982) (suit not barred; 9 year delay).

(continued...)

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[8](...continued)

Holden v. Burlington Northern, Inc., 36 F.E.P. Cases 798 (D.C. Minn. 1984)(suit filed nearly 10 years after filing of charge not barred by laches, where employee was not aware she could bypass EEOC process and EEOC contacted her twice during the 10 year period to assure her it had not forgotten her).

Holsey v. Armour & co., 743 F.2d 199 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985)(decision to rely on EEOC's administrative process; laches did not bar suit; 5 year delay).

Howard v. Roadway Express, Inc. 726 F.2d 1529 (11th Cir. 1984)(complainant's failure to file suit until after completion of EEOC's administrative process was not inexcusable delay and cannot support application of laches).

Johnson v. Angelica Uniform Group, 36 F.E.P. Cases 85 (D.C. Mo. 1984)(suit not barred by laches where EEOC caused any delay and employer was not prejudiced).

McLemore v. Interstate Motor Freight System, Inc., 33 F.E.P. Cases 1384 (D.C. Ala. 1984)(8 year three month delay in filing suit resulted in suit being barred by laches, despite employee's claimed reliance on EEOC, where EEOC informed employee that she could pursue her claim independently in court).

(continued...)

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[8](...continued)
Pande v. Johns Hopkins University, 598 F. Supp. 1084 (D.C. Md. 1984)(employee's 10 year delay inexcusable, despite claimed reliance on EEOC, where he was represented by counsel during administrative processing).

Patzer v. University of Wisconsin System, Board of Regents, 577 F. Supp. 1553 (D.C. Wis. 1984).

Peques v. Morehouse Parrish School Board, 706 F.2d 735 (5th Cir. 1983)(employee's suit barred by laches; nine year delay in filing suit).

Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983)(21 month delay between EEOC's no cause determination and issuance of notice of Right to Sue by Department of Justice did not support dismissal on basis of laches).

Nilsen v. City of Moss Point, Mississippi, 621 F.2d 117 (5th Cir. 1982)(equitable part of mixed claim for equitable and legal relief can be barred by laches, but legal part can be barred only by statute of limitations).

Staples v. Avis-Rent-A-Car System, Inc., 537 F. Supp. 1215 (D.C.N.Y. 1982)(suit not barred by 4 year delay between filing charge and filing suit, where employee is not required to litigate prior to termination of EEOC investigation and conciliation efforts).

(continued...)

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[8](...continued)

White v. Washington Metropolitan Area Transit Authority, 32 F.E.P. Cases 1014 (D.C. D.C. 1981)(employee's 4 year delay in requesting Right to Sue letter after receiving notice of EEOC's dismissal of charge, requires dismissal of suit).

Worley v. Western Electric Co., 26 F.E.P. Cases 1708 (D.C. Ga. 1981) (employees not barred by laches for failing to intervene in another suit or to request Right to Sue letter immediately after decision adverse to employer in other suit was made known to them).

Bratton v. Bethlehem Steel Corp., 649 F.2d 658 (9th Cir. 1980)(reversing dismissal on laches grounds).

Fields v. Hoerner Waldorf Corp., 33 F.E.P. Cases 1471 (D.C. Ala. 1980)(9 year delay by EEOC not charged against plaintiff, but suit was barred by laches due to plaintiff's 2 year delay in filing suit after issuance of first Right to Sue letter, which employee did not receive).

Harris v. Ford Motor Co., 487 F. Supp. 429 (D.C. Mo. 1980)(employee not barred by laches despite fact that she had moved without informing the EEOC of new address and filed suit after second notice of Right to Sue was issued), [22 F.E.P. 922], judgment for employer affirmed, 651 F.2d 609 (8th Cir. 1981).

(continued...)

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[8](...continued)
Sangster v. United Airlines, 633 F.2d 864 (9th Cir. 1980)(suit not barred due to 4 1/2 year delay between reasonable cause finding and filing suit; EEOC did not inform employee of her right to sue).

Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), reh. en banc granted, 604 F.2d 449 (5th Cir. 1979),(en banc,, 619 F.2d 459, 463 (5th Cir. 1980),, affirmed,, 452 U.S. 89 (1981)(suit not barred by laches).

Boone v. Mechanical specialties Co., 609 F.2d 956 (9th Cir. 1979)(suit barred by laches due to 7 year delay, where employee refused EEOC's offers to issue him a Right to Sue letter).

Fowler v. Blue Bell, Inc., 596 F.2d 1276 (5th Cir. 1979), cert. denied, 444 U.S. 1018 (1980).

Stallworth v. Monsanto Co., 21 F.E.P. Cases 364 (D.C. Fla. 1979)(employee's suit not barred by laches).

Schwabenbauer v. Board of Education, City School Dist., City of Olean, 25 F.E.P. Cases 767 (D.C. N.Y. 1978)(suit not barred where filed within statutory period and employee relief on EEOC), vacated & remanded, 667 F.2d 305 (2nd Cir. 1981).

Stasney v. Southern Bell Telephone & Telegraph Co., 458 F. Supp. 314 (D.C.
(continued...)

guidance would be of great benefit to the lower courts.

The Eighth Circuit's decision that a Title VII plaintiff may not rely on the EEOC's administrative processing of his charge, is therefore in conflict with the decisions of other circuits and is inconsistent with prior decisions of this

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[8](...continued)
N.C. 1978)(4 year delay did not warrant dismissal), affirmed in part,, remanded in part, 628 F.2d 267 (4th Cir. 1986)[23 F.E.P. 633].

Breeding v. S. Louis & San Francisco Ry. Co., 33 F.E.P. Cases 1514 (D.C. Ala. 1977)(suit brought more than 5 years after employee's discharge barred by laches, where EEOC's notice of charge to employer did not state employee's name).

Nickel v. Highway Industries, Inc., 441 F. Supp. 477 (D.C. Wis. 1977)(employees may litigate in 1977 action that related to events in 1969)[21 F.E.P. Cases 1088].

Richardson v. Delta Drayage Co., 433 F. Supp. 50 (W.D. La. 1977)(suit not barred where 8 year delay, even though employee was entitled by EEOC regulations to demand notice of Right to Sue after 180 days)[21 F.E.P. 893].

Court stating that primary reliance for enforcement of Title VII is to be placed on the EEOC. This Court should therefore grant the petition in order to review the conflict between the circuits and the inconsistency between the decisions of this Court and the decision of the lower courts.

II.

THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE REGARDING TITLE VII PLAINTIFFS' RIGHTS AND RESPONSIBILITIES AND AS TO THE ALLOCATION OF THE BURDEN OF DELAYED ENFORCEMENT OF TITLE VII BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHICH SHOULD BE RESOLVED BY THIS COURT

The present case raises important questions concerning the responsibilities of private Title VII plaintiffs and should bear the burden of EEOC delay and errors in processing discrimination charges. At issue is whether a Title VII claimant at some point in time has an

obligation to request his or her "optional" right to sue letter or face dismissal on laches grounds, and whether pro se claimants alleging discrimination in employment are to bear the burden of EEOC backlogs, delays and errors.

The Eighth Circuit here has in effect held that the complainant has an obligation to request a right to sue letter, and that mere inquiry by the complainant to the EEOC is not a sufficient showing of interest to preserve the complaint's Title VII claim.

The court in Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986), in addressing a case in which no inquiry had been made by the complainant to the EEOC during a nine year period, stated that it "need not decide if one in Jeffries' position must necessarily

demand a right to sue letter. But see Brown v. Continental Can Corp., 765 F.2d 810, 814 (9th Cir. 1985)(complainants not required to request right to sue letter). Jeffries, supra, at 682. See also Cleveland Newspaper Guild v. Plain Dealer Pub. Co., supra, at 1160 (dissenting opinion of Milburn, J.). However, in the present case, both the district court and the court of appeals found that although petitioner had made some inquiry about the status of his charge, it was not enough.[9] (A. at 21a-24a; 5a-8a.)

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[9] It should be noted that petitioner testified at trial that he had called or visited the EEOC on at least a yearly basis and was told his case was being handled. (T. 38-39) An official of the EEOC testified at trial that Garrett may very well have been given incorrect information each time he called because the National Programs case against G.M. was pending during this entire period (T. 207-209), because the EEOC's computer file locator record was frequently inaccurate, and because of the "disarray" at the Commission (T. 177, 180-182).

The effect of the court of appeals' decision is to make the optional procedure of a private suit under Title VII mandatory for Title VII complainants, contrary to Congress' determination that EEOC enforcement of Title VII was to be the primary method of enforcement. See, Occidental Life, supra, at 365-66, 368. This result, which is contrary both to Congressional intent and to the purposes of Title VII to eradicate discrimination in employment without imposing artificial barriers to enforcement of the law, calls for review by this Court.

In addition, the present case raises the question of who should bear the burden of EEOC delays and errors in processing discrimination charges. As has been suggested, the only "error" committed by the petitioner here was his failure to request a right to sue letter

at an earlier date. Petitioner did not affirmatively cause any of the delay in this case, but merely relied on the EEOC's statements to him that they were handling his case against G.M.

The EEOC, however, delayed over a year between its reasonable cause finding in May, 1971 and its determination that conciliation efforts had failed in August, 1972; delayed an additional six months before sending the file to the Chicago Litigation Center; did not make a determination whether the EEOC would file suit before sending the file to the national Programs Office in 1973 or 1974, or at any time thereafter; did not send Garrett a right to sue letter prior to 1985; sent the file to the Federal Records Center in March, 1976 without notice to Garrett or G.M., without putting the file back on track for a

litigation decision, and without closing the file; delayed issuing a right to sue letter for an additional year and three quarters between late 1983 and July, 1985; and gave Garrett incorrect information about whether his case against G.M. was still ongoing.

EEOC delays and errors are a long standing problem. Congress noted the EEOC's backlog of cases at the time of the 1972 amendments to Title VII, Occidental Life, supra, at 362-64, which was part of the rationale for establishing a private suit option. The EEOC's delays in bringing its own enforcement actions has been the subject of a host of lower court opinions.[10]

EEOC delays have been the cause of the great majority of cases in which dismissal of private Title VII suits has

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[10] See note 6, supra.

been sought on laches grounds.[11] The EEOC's delays in processing charges under the Age Discrimination In Employment Act, 29 U.S.C. § 621 et seq., led to the enactment in 1988 of the Age Discrimination Claims Assistance Act of 1988, P.L. 100-283, which extended the statute of limitations for employees whose age discrimination claims were jeopardized by the EEOC's failure to process cases filed after December 31, 1983 before the two year statute of limitations for ADEA actions expired.

The EEOC's most recent annual report (for the year 1984) states that in fiscal year 1984, the total number of charges filed with the EEOC was 71,197, and the total number of closures was 55,034, 19th

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[11] See cases cited in note 8, supra. But cf., Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979).

Annual Report of the Equal Employment Opportunity Commission, at 18. In fiscal year 1983, the EEOC had 70,252 charges filed, and closed 74,441. Id. at 18. For the two years, 1983 and 1984, therefore a net total of 11,974 more cases were filed than were resolved. The EEOC's annual report does not include any figures on the backlog of unresolved charges.

The EEOC itself interprets § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), as authorizing the charging party to await the outcome of the EEOC's administrative process prior to filing suit unless the charging party intentionally delays the proceedings. Cleveland Newspaper Guild, supra, 839 F.2d at 1159 (dissenting opinion of Milburn, J.)(referring to amicus brief of EEOC). Judge Milburn's dissenting

opinion in the Cleveland case notes the standard of deference due administrative agencies by the courts. Id., at 1159.

Petitioner submits that the long standing and growing backlog of EEOC charges can only mean that the question of the application of laches in Title VII cases will assume greater and greater importance in the coming years. The failure of the court of appeals to consider the possibility of a limitation on petitioner's back pay recovery rather than dismissal of his case left the whole burden of the EEOC's delay on the petitioner here, in a case in which the defendant's liability was established as a matter of law. (A. 32a, 9a.) A fair balancing of the equities in the present case would lead to the conclusion that dismissal of this action with consequent denial of all relief was unjustified.

CONCLUSION

Petitioner respectfully urges this Court to grant the petition for a writ of certiorari. There is a clear-cut split between the circuits on the issue, the questions presented here arise with great frequency in the lower courts, and matters of national importance are raised.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT
April 14 1988

JUDGMENT

No. 87-1626/1671

Warren Garrett,	*	
	*	
Appellant,	*	
	*	Appeal from
vs.	*	the United
	*	States
General Motors	*	District
Corporation,	*	Court for
	*	the Eastern
Appellee.	*	District of
	*	Missouri
	*	
	*	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

April 14, 1988

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1626

Warren Garrett, *
*
Appellant, *
*
v. *
*
General Motors *
Corporation, *
*
Appellee, *

Appeals from the United States District Court for the Eastern District of MIssouri

No. 87-1671

Warren Garrett, *
*
Appellee, *
*
v. *
*
General Motors *
Corporation, *
*
Appellant. *

Submitted: January 11, 1988

Filed: April 14, 1988

Before WOLLMAN, Circuit Judge, ROSS, Senior Circuit Judge, and BEAM, Circuit Judge.

ROSS, Senior Circuit Judge.

Warren Garrett appeals from a final judgment of the district court[1] entered in favor of General Motors Corporation (GMC). In 1985, Garrett brought this action against GMC under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging race discrimination in the terms and conditions of his employment and in his termination from the St. Louis GMC plant in 1971. The district court entered judgment in favor of GMC, holding that the equitable doctrine of laches barred Garrett's Title VII claims. We affirm.

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[1]The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

Garrett, a black man, was employed by GMC from May 18, 1967, until his termination on March 29, 1971. While he was employed, Garrett twice filed discrimination charges against GMC with the Equal Employment Opportunity Commission (EEOC) with respect to the terms and conditions of his employment. Later, in march of 1971, Garrett was terminated, along with twenty-six other black employees, for participating in a wildcat strike held in protest of GMC's alleged discriminatory practices. Within several days after his discharge, Garrett filed an additional charge of discriminatory termination with the EEOC. He subsequently moved to Decatur, Illinois, where he awaited processing of his EEOC claims.

Garrett testified that between 1972 and 1980 he made numerous visits and phone

calls to the EEOC office in St. Louis to inquire about the status of his case, and that on each occasion he was told his case was still pending. In 1980, Garrett again contacted the EEOC office after learning that three GMC employees, who were also terminated as a result of the 1971 wildcat strike, had been awarded back pay in their Title VII suit against GMC. See Mosley v. General Motors Corp., 497 F. Supp. 583 (E.D. Mo. 1980), aff'd, 691 F.2d 504 (8th Cir. 1982). In late 1983, Garrett again called the EEOC, this time to inquire whether his case would be covered by a national conciliation agreement reached between the EEOC and GMC in settlement of a nationwide discrimination suit filed in 1973. At that time he was informed by the EEOC that his file had been destroyed. He was advised, however, that he should wait to see if his case would be covered by the

national agreement since the EEOC had reviewed his file for possible inclusion. Garrett later learned that his case would not be covered by the national agreement. Eventually, on July 22, 1985, the EEOC issued Garrett a right-to-sue letter, and this suit was filed in district court on September 11, 1985.

At trial, a considerable amount of evidence was offered to attempt to reconstruct the EEOC's processing of Garrett's claims. However, because all of Garrett's EEOC records, except for the skeletal case control ledger, had been destroyed in either 1976 or 1979, the district court concluded that it was very difficult to determine how the case was actually processed. Nonetheless, the

district court expressed its doubt that the July 1985 right-to-sue letter was the first and only letter received by Garrett.

In considering Garrett's testimony, the district court discredited the frequency with which Garrett claimed to have contacted the EEOC office in pursuing his claim. Specifically, the district court found that "[Garrett's] contact with the EEOC was minimal until 1980 when he learned of the successful litigation by other disciplined employees. Even then he did not actively pursue his rights until the beginning of 1984 when he learned of the National [Conciliation] Agreement." Garrett v. General Motors Corp., No. 85-2219C(6), slip op. at 6 (E.D. Mo. Apr. 24, 1987).

Based on its findings of fact, the district court held as a matter of law that Garrett's action was barred by the

doctrine of laches. The district court concluded that the fourteen and one-half year delay in filing this suit was unreasonable and unexcused and that GMC's defense had been prejudiced as a result. The district court also held that, absent the application of laches, GMC was collaterally estopped on the issue of liability by the decision in Mosley v. General Motors Corp., supra, 497 F. Supp. at 590. The district court specifically stated, "the Mosley case establishes as a matter of law that defendant's discharge of plaintiff on March 29, 1971, was in violation of Title VII." Garrett, supra, slip op. at 7.

Garrett now appeals the district court's application of laches in barring his suit, and GMC cross appeals the

district court's finding of collateral estoppel with respect to the issue of liability.

Garrett argues that the application of laches by the district court was an abuse of discretion and based upon clearly erroneous findings of fact. Stressing that the "[p]rimary responsibility for enforcing Title VII has been entrusted to the EEOC," EEOC v. Shell Oil Co., 466 U.S. 54, 61-62 (1984), and that the legislature intended the individual suit option to be the exception and not the rule, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 366 (1977), Garrett argues that a plaintiff's failure to file a Title VII claim until completion of the EEOC process is not inexcusable delay and cannot support the application of laches. He contends that so long as the plaintiff has (1) made reasonable, periodic inquiry into the

status of his claim, and (2) done nothing to affirmatively cause the delay, he has a right to indefinitely await completion of the EEOC's process before filing suit.

We disagree. This circuit has previously recognized that the doctrine of laches is a proper defense in a Title VII action, and may be used to bar a lawsuit where the plaintiff is guilty of (1) unreasonable and unexcused delay, (2) resulting in prejudice to the defendant. Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243, 244 (8th Cir. 1987). See Cleveland Newspaper Guild v. Plain Dealer Publishing Co., No. 86-3140, (6th Cir. Feb. 11, 1988) (en banc) (WESTLAW, 1988 WL 8795) (to be reported at 839 F.2d 1147); Jeffries .v. Chicago Transit Auth., 770 F.2d 676, 679 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986); Boone v. Mechanical Specialties Co., 609 F.2d 956,

958-59 (9th Cir. 1979). We have also recognized that "laches may apply either when the delay in bringing suit was caused by a private plaintiff or when the delay is the fault of an administrative agency." Whitfield, supra, 820 F.2d at 244-45 (footnote omitted). We agree with the Sixth Circuit that:

> [W]hether another party contributes to the delay is only one factor in assessing the reasonableness of a plaintiff's actions. The question is not purely one of assigning fault. As stated in Pomeroy's treatise: "A court of equity * * * has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. * * *" J. Pomeroy, 11 Equity Jurisprudence, § 419 at 171 (S. Symons 5th ed. 1941). Thus, even though another party may have contributed to the delay, the court still must determine whether plaintiff's own delay or inaction inexcusably caused prejudice to the defendant.

Cleveland Newspaper Guild, supra, (WESTLAW, 1988 WL 8795 at 15 (to be reported at 839 F.2d at _____).

Whether laches should be applied depends upon the facts of the particular case and is a matter within the sound discretion of the trial court. Whitfield, supra, 820 F.2d at 245.

It is undisputed that Garrett's file was improperly processed by the EEOC and that Garrett was misinformed, at least on one occasion, about the status of his case. The court must also consider, however, whether the plaintiff's own delay or inaction caused prejudice to the defendant. In this instance, the district court determined that Garrett's contact with the EEOC was minimal between 1972 and 1980, and that he did not actively pursue his claim until 1984. We conclude that the district court's findings of fact in this regard are not clearly erroneous. Based on these findings, it was within the district court's discretion to find that

Garrett had made insufficient inquiry between 1972 and 1984 and that GMC had been prejudiced as a result of the twelve year delay. We find no abuse of discretion in the district court's application of laches under these circumstances.

We have also carefully considered each of the appellant's remaining arguments and find them to be without merit. Furthermore, because we affirm the district court's application of laches in barring Garrett's Title VII claims, we decline to reach the issues raised in GMC's cross appeal.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 87-1626/1671-EM

Warren Garrett,	*	
	*	
Appellant,	*	Appeals from
	*	the United
vs.	*	States
	*	District
General Motors	*	Court for
Corporation,	*	the Eastern
	*	District of
Appellee.	*	Missouri

Petition for rehearing en banc filed by appellant/cross-appellee, Warren Garrett, has been considered by the Court and is denied.

Judge McMillian did not participate.

Petition for rehearing by the panel is also denied.

May 20, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
Apr 24 1987
Eyvon Mendenhall
U. S. District Court
E. District of Mo.

WARREN GARRET,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 85-2219C(6)
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff Warren Garrett brought this action pursuit to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., alleging that General Motors Corp. discriminated against him on the basis of race: (1) in the terms and conditions of employment, and (2), in discharging him on March 29, 1971.

The case was tried to the Court. After consideration of the record, the

parties' joint stipulation of facts, evidence and exhibits presented at trial, and the applicable law, the Court enters the following findings of fact and conclusions of law in accordance with Rule 52, Fed. R. Civ. P. Judgement is in favor of defendant.

FINDINGS OF FACT

Defendant General Motors Corp. (GMC) is a Delaware corporation doing business in the State of Missouri and is an "employer" within the meaning of Title VII.

Plaintiff, a black male, was employed by GMC on May 18, 1967. In September 1970 plaintiff filed a grievance with his union about racially discriminatory conditions at work, and on December 22, 1970 [2] and

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[2]This charge was received in the EEOC Kansas City District Office on October 8, 1970. After deferment to the stage agency it was considered filed with the EEOC on December 22, 1970.

March 18, 1971 he filed discrimination charges against GMC with the Equal Employment Opportunity Commission (EEOC).

On March 29, 1971 plaintiff was discharged for participating in a wildcat strike in protest of defendant's alleged racially discriminatory practices. A total of 125 black employees were disciplined as a result of the strike. Twenty-six of these employees were initially discharged; after settlement of grievances, six of those discharged, including plaintiff, remained discharged. Within several days plaintiff notified the EEOC in St. Louis of his discharge, and the discharge was made part of his pending charge.

Unable to find work in early 1972 plaintiff left St. Louis and moved to Decatur, Illinois where he has since held several jobs and now resides.

On May 25, 1972 the St. Louis district office of the EEOC reached a "reasonable cause" decision with respect to plaintiff's charge, and on August 10, 1972, conciliation efforts with GMC failed.

On February 2, 1973 plaintiff's file was forwarded to the EEOC's Regional Litigation Center in Chicago, Illinois to be considered for litigation by the EEOC. Sometime prior to November 1974 the file was transferred to the National Programs Division of the EEOC, for the probable purpose of determining if it was suitable for inclusion in a nationwide claim the EEOC was bringing against GMC. The file was designated as "Unsuitable" by the National Programs Division and in November 1974 was sent from the National Programs Division to the St. Louis District Office. In March 1976 the file was sent from the

St. Louis office to the Federal Record Center in Washington, D.C. where it was destroyed in accordance with EEOC procedures. It is unclear when the file was destroyed. There was evidence that it was destroyed in October 1976. Yet, other evidence indicated that it was destroyed in 1979.

On September 30, 1980 the U.S. District Court for the Eastern District of Missouri held in Mosley v. General Motors Corp., 497 F. Supp. 583 (E.D. Mo. 1980), aff'd, 691 F.2d 504 (8th Cir. 1982), that the discipline imposed by GMC following the March 1971 wildcat strike violated Title VII. The three plaintiffs in that suit were awarded back pay due to the discipline, plus costs and attorneys' fees.

Sometime in late 1980 plaintiff's stepfather sent plaintiff a newspaper

article on the Mosley case. After receiving the article, plaintiff contacted the EEOC and was told that his file had been destroyed.

Plaintiff testified that between 1972 when he left St. Louis and 1980 when he received the newspaper article, he had made personal visits to the EEOC in St. Louis on at least a yearly basis to inquire about his case and that each time the EEOC representative with whom he spoke told him that his case was still pending. The Court disbelieves this testimony. The testimony is undermined by the undisputed fact that plaintiff's EEOC file was closed in March 1976 and sent to the Federal Record Center. The Court does not give credence to plaintiff's allegation that each time he contacted the EEOC thereafter--at least 10 times according to his count--he would have been given

incorrect information.

In late 1983 plaintiff's aunt sent him a newspaper article dated October 19, 1983 which reported that GMC and the EEOC had reached a National Settlement Agreement on a case stemming from discrimination charges brought against GMC in 1973 by the EEOC. After receiving the article plaintiff again contacted the EEOC and asked if he was covered by the Settlement Agreement. Plaintiff testified that one EEOC representative told him that plaintiff's records had been destroyed and that he did not know anything about his case. However, another EEOC representative allegedly told him that his claim was still active.

In January 1984 plaintiff wrote a letter to his U.S. Congressman requesting information regarding the status of his claim against GMC and asking when he might

expect to receive his share of the settlement. In response to inquiries, the Congressman received a letter from GMC and a letter from the EEOC, both of which were forwarded to plaintiff. The letter from the EEOC stated that plaintiff had been sent a right-to-sue letter in August 1972 when conciliation efforts failed. The letter from GMC stated that the EEOC closed plaintiff's case in December 1974 and destroyed his file in 1980, and that plaintiff did not have a pending claim.

Upon receipt of these letters plaintiff wrote to the Chairman of the EEOC in May 1984 stating that he had never received a right-to-sue letter. In June 1984 plaintiff received two letters in response. The first was from the EEOC's Washington, D.C. office stating that because the EEOC had no records indicating that plaintiff had previously been issued

a right-to-sue letter, the Washington office had directed the St. Louis office to issue plaintiff a right-to-sue letter. The second letter was from the Acting District Director in St. Louis and stated that plaintiff may not have been issued a right-to-sue letter but that such a letter would not now be issued until it was determined whether plaintiff was covered by the National Settlement Agreement.

On July 22, 1985 plaintiff was issued a right-to-sue letter. This suit was filed on September 11, 1985, approximately 15 years after the filing of plaintiff's original EEOC charge and 14-1/2 years after plaintiff's discharge from GMC.

The question of whether an earlier right-to-sue letter was received by plaintiff was a key factual dispute at trial. Clearly under EEOC procedures, as established by the evidence, plaintiff

should have received a notice years earlier. Plaintiff tried to establish, based upon a reconstruction of what may have happened, that plaintiff's file was sidetracked from the normal EEOC process and that as a result a right-to-sue letter was never issued (i.e., until 1985). No explanation was offered as to why plaintiff would not have received a timely right-to-sue letter when the three Mosley plaintiffs did. Because all of plaintiff's EEOC records, except for the skeletal Case Control Ledger, have been destroyed, it is impossible to know what actually happened. Based upon the evidence this Court cannot find that it is more likely than not that the July 1985 right-to-sue letter was the first and only received by plaintiff.

CONCLUSION OF LAW

The equitable doctrine of laches is

applicable to Title VII actions brought by private plaintiffs. Boone v. Mechanical Specialties Co., 609 F.2d 956, 959 (9th Cir. 1979).

To establish an affirmative defense of laches the defendant has the burden of proof to show: (1) an unexcusable and unreasonable delay by the plaintiff, and (2) prejudice to the defendant. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979); Cleveland Newspaper Guild v. The Plain Dealer Publishing Co., No. 86-3140, slip op. at 4 (6th Cir. March 6, 1987) (private plaintiff Title VII case). In considering whether to apply laches to defeat a suit the district court must look to the "peculiar equitable circumstances of that case" and "focus upon the length of the delay, the reasons therefore, how the delay affected the defendant, and the overall fairness of

permitting the assertion of the claim." Goodman v. McDonnell Douglas Corp., 606 F.2d at 806.

Delay

There is some disagreement among the circuits as to whether EEOC delays in processing a claim should be attributable to a plaintiff in considering whether plaintiff's delay in bringing a Title VII suit is excusable. The Seventh Circuit has held that a "plaintiff does not have an absolute right to await termination of EEOC proceedings." Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985) (relying on administrative process cannot excuse 10 year delay between bringing charge and filing suit where plaintiff did nothing to prod agency or to seek a right-to-sue letter), cert. denied, 469 U.S. 925 (1986). The D.C. Circuit and the Ninth Circuit have taken a similar

position. Rosen v. District of Columbia, 702 F.2d 1202, 1204 (D.C. Cir. 1983) holds that plaintiff's failure to secure a right-to-sue letter for four years does not constitute unexcusable delay where plaintiff did not sleep on his rights. The holding in Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149, 1152 (9th Cir. 1982) is that the EEOC delay of five years in issuing right-to-sue letter is not attributable to plaintiff because she repeatedly appealed to the EEOC for action and was assured by the agency that suit would be filed on her behalf.

The Eleventh Circuit, on the other hand, has held that the plaintiff's "failure to file his Title VII until completion of the EEOC process was not inexcusable delay and cannot support the application of laches." No mention is made of any action on the part of

plaintiff during the five year delay in that case, or of any obligation upon the plaintiff to take any action. Howard v. Roadway Express, Inc., 726 F.2d 1529, 1533 (11th Cir. 1984). The Sixth Circuit follows this approach in Cleveland Newspaper Guild v. The Plain Dealer Publishing Co., No. 86-3140, slip op., which involves a ten year EEOC process before a right-to-sue letter was finally issued. In that case, however, the plaintiff was affirmatively told by letter from the EEOC two years after the charge was filed that the EEOC was uncertain when it could begin to process the charge and that plaintiff could choose to keep the charge open until the EEOC could attend to it rather than bring suit in court at that time.

Under the finding of facts in this case, the Court concludes that the passage

of 15 years from the filing of plaintiff's terms-and-conditions EEOC charge, and of 14-1/2 years from the amendment of his charge to include his discharge constitute inexcusable and unreasonable delay. As stated, plaintiff's contact with the EEOC was minimal until 1980 when he learned of the successful litigation by other disciplined employees. Even then he did not actively pursue his rights until the beginning of 1984 when he learned of the National Settlement Agreement.

Prejudice

The issue of whether a defendant suffered prejudice from a delay is intertwined with the determination of whether a delay is unreasonable. "If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice require[d] before the suit should be barred is great, whereas if the

delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required." Goodman v. McDonnell Douglas Corp., 606 F.2d at 800. EEOC v. Westinghouse Electric Corp., 592 F.2d 484, 486 (8th Cir. 1979) and EEOC v. Liberty Loan Corp., 584 F.2d 853, 857 (8th Cir. 1978) enunciate a stricter standard for finding prejudicial effect when the EEOC itself delays in bringing a Title VII suit. In such a situation, a defendant must establish "with such clarity as to leave no room for controversy" that it has been substantially and unduly prejudiced because of the EEOC's delay.

Applying this stricter standard of prejudice to this private plaintiff case, the Court concludes that plaintiff's delay has caused GMC substantial and undue difficulties in defending the law suit. The prejudice to defendant as to

plaintiff's claim of discriminatory terms and conditions of employment prior to his termination is clear. Records have been destroyed, supervisory personal responsible for the alleged acts have died, memories have faded. It is precisely these types of problems which the doctrine of laches addresses.

The prejudice to defendant as to plaintiff's claim of discriminatory termination is slightly different. The Court concludes that the Mosley case establishes as a matter of law that defendant's discharge of plaintiff on March 29, 1971 was in violation of Title VII. Thus, the current unavailability of evidence on the circumstances surrounding the termination is not really relevant.

Defendant, however, has been seriously prejudiced by the 14-1/2 year delay in another way. If the EEOC had

issued a right-to-sue letter prior to that issued on July 22, 1985, as defendant tried to establish, this suit would be barred by the jurisdictional requirement that a Title VII suit be filed within 90 days of receipt of a right-to-sue letter. See 42 U.S.C. §2000e-5(f). As the above findings of fact set forth, because plaintiff's EEOC records were destroyed, at the latest in 1979, it is impossible to determine whether a timely right-to-sue letter was received. Thus, the delay involved in the case precluded defendant from establishing a statute of limitations defense. The Court concludes that these circumstances support the application of laches in this case.

Another purpose underlying the doctrine of laches, other than the impairment of a defendant's ability to defend, is repose--the concept that at

some point a party is entitled to assume that it is no longer subject to liability for a certain past event. Laches shares this purpose with statutes of limitations. In the present case the injury-causing event occurred 14-1/2 years before suit was initiated. This is not a case in which plaintiff first became aware of his injury some time after the event. Every case wherein laches is to be applied involves a "delicate balance of equities." Goodman v. McDonnell Douglas Corp., 606 F.2d at 809. For the reasons set forth, the Court concludes that the circumstances of this case warrant barring plaintiff's suit on the basis of laches.

Judgment is accordingly entered in favor of defendant General Motors Corporation.

Dated this 24 day of April, 1987.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
Jun 27 1987
Eyvon Mendenhall
U. S. District Court
E. District of Mo.

WARREN GARRETT,	)	
Plaintiff,	)	
v.	)	No. 85-2219C(6)
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	

ORDER AND MEMORANDUM

IT IS HEREBY ORDERED that plaintiff's motion for partial summary judgment on the issue of defendant's liability is denied.

Plaintiff, a black male, filed this Title VII suit on September 11, 1985 for injunctive relief and damages against General Motors Corp. alleging that defendant terminated his employment on March 29, 1971 in violation of 42 U.S.C. §§2000e-2(a) and 3(a), because of his

participation in a work stoppage protesting defendant's racially discriminatory practices.

It is undisputed that in March 1971 defendant disciplined 125 black employees, one of whom was plaintiff, for participating in a wildcat strike in protest of defendant's alleged racially discriminatory practices. In Mosley v. General Motors Corp., 497 F. Supp. 583 (E.D. Mo. 1980) (Mosley), aff'd, 691 F.2d 504 (8th Cir. 1982), a Title VII suit brought by three suspended employees, the Court held that defendant's disciplinary measures were in violation of 42 U.S.C. §2000e-2(a) because they were more severe than those imposed on employees protesting non-racial concerns, and in violation of 42 U.S.C. §2000e-3(a) because the measures were retaliatory. The Court held that defendant was liable to the plaintiff

employees for the pay lost during their suspensions, plus costs and attorneys' fees.

Plaintiff was not a party in the Mosley action. He now argues that he is entitled to summary judgment on the issue of defendant's liability to him based on the collateral estoppel effect of the judgment against defendant in Mosley.

In opposition to this motion defendant argues that (1) there are factual issues concerning whether plaintiff's suit was timely filed and if so, whether the doctrine of laches should bar the suit, and (2) collateral estoppel is not applicable because plaintiff could have joined in the earlier suit and because the prior judgment did not

necessarily decide whether defendant discriminated against this plaintiff.

Timeliness of suit

Pursuant to this Court's order dated February 4, 1986, plaintiff has satisfied the Court that the charge of racial discrimination filed with the Equal Employment Opportunity Commission (EEOC) and the EEOC Notice of Right to Sue issued to plaintiff on July 22, 1985 encompassed plaintiff's discharge upon which this Title VII suit is based. Thus plaintiff's suit filed September 11, 1985 was filed within the 90 day period provided for in 42 U.S.C. §2000e-5(f).

Collateral estoppel

Under the doctrine of collateral estoppel, or issue preclusion, a judgment on the merits in a prior suit precludes relitigation of issues actually decided and necessary to the outcome of the first

action. Collateral estoppel is appropriate where (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the party to be estopped was a party or in privy with a party to the prior adjudication; and (4) the party to be estopped was given full and fair opportunity to be heard on the adjudicated issue. Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir. 1979); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1134 (8th Cir.), cert. denied, 459 U.S. 1070 (1982).

In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979), the Supreme Court granted the district courts broad discretion to determine when offensive collateral estoppel should be applied, i.e., when a plaintiff may estop a defendant from relitigating issues which

the defendant previously litigated and lost against another plaintiff. Special circumstances which would counsel against the application of offensive collateral estoppel include the stance of a "wait and see" plaintiff who could have participated in the previous action but, instead, held back to await the outcome of that action. The Court stated as follows:

> The General rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, [for any reason] ... the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id. at 331, 99 S.Ct. at 652.

See also Crowder v. Lash, 687 F.2d 996, 1010 (7th Cir. 1982).

The Court concludes that the four technical elements of collateral estoppel set forth above are satisfied in the present case. The record now before the

Court, however, does not indicate why plaintiff could not have joined in the earlier action. Plaintiff has thus failed to meet his burden for summary judgment under Rule 56(c), Fed.R.Civ.P., and his motion is accordingly denied.

Dated this 27 day of June, 1986.

UNITED STATES DISTRICT JUDGE

STATUTE INVOLVED

42 U.S.C. § 2000e-5.

Prevention of unlawful employment practices

(a) **Power of Commission.** The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) **Charges; notification; investigation and determination.** Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the

charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days,and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord

substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate by any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned

for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) **State or local proceedings.** In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by

the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) **Time for action under State or local law.** In the case of any charge filed by a

member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the

practice alleged.

(e) **Time for filing charges.** A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days

after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the Sate or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) **Civil action by Commission, Attorney General, or person aggrieved.** (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political

subdivision named in the charge.... If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision,

shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving

a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in

the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been

brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case maybe, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for

hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

* * *

(i) **Proceedings to compel compliance with orders.** In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(July 2, 1964, P. L. 88-352, Title VII, § 706, 78 Stat. 259; Mar. 24, 1972, P. L. 92-261, § 4, 86 Stat. 104.)

(2)

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARREN GARRETT,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Court of Appeals for the Eighth Circuit correctly hold that a Title VII suit can be barred by the application of laches where the plaintiff does not exercise due diligence in filing suit and the defendant is thereby prejudiced.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

Rule 28.1: Statement

General Motors is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly-owned except:

AeroVironment Inc. (USA)
Alambrados Automatrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Cableados de Juarez, S.A. de C.V. (Mexico)
CABLESA-Industria de Componentes Electricos Limitada (Portugal)
Calsonic Harrison Co., Ltd. (Japan)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)
Delco Electronics Corporation (USA)
Delkor Battery Company, Ltd. (Korea)
Delmex de Juarez, S.A. de C.V. (Mexico)
Delredo, S.A. de C.V. (Mexico)
Delta Industrial, C.A. (Venezuela)
Detroit Deere Corporation (USA)
Detroit Diesel Corporation (USA)
DHB - Componentes Automotivos S.A. (Brazil)
DHMS Industries, Ltd. (Korea)

Diffracto Limited (Canada)
DR DE CHIHUAHUA, S.A. de C.V. (Mexico)
Ensemble de Cables Y Componentes, S.A. de C.V. (Mexico)
Fabrica Columbiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Brasil, Ltda. (Brasil)
General Motors de Colombia S.A. (Colombia)
General Motors del Ecuador S.A. (Ecuador)
General Motors Egypt, S.A.E. (Egypt)
General Motors Espana, S.A. (Spain)
General Motors (Europe) AG (Switzerland)
General Motors France (France)
General Motors Hellas, A.B.E.E. (Greece)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
General Motors Korea Co., Ltd. (Korea)
General Motors del Peru S.A. (Peru)
General Motors de Portugal, Limitada (Portugal)
General Motors Terex do Brasil Ltda. (Brasil)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GM Locomotivas Ltda. (Brazil)
GMFanuc Robotics Corporation (USA)
Hua Tung Automotive Corporation (Rep. of China)
IBC Vehicles Limited (England)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kablewerke reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
NHK Inland Corporation (Japan)
Omnibus BB Transportes, S.A. (Ecuador)
Packard Electric Ireland Limited (Ireland)
Philip Crosby Associates, Inc. (USA)
Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Rimir, S.A. de C.V. (Mexico)
Rio Bravo Electricos, S.A. de C.V. Mexico)
Robotic Vision Systems, Inc. (USA)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (S. Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
Teknowledge, Inc. (USA)
TEREX Equipment Limited (Scotland)
Vauxhall Motors Limited (England)
Vestiduras Fronterizas, S.A. de C.V. (Mexico)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)

As of September 1, 1988

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	i
Rule 28.1: Statement	ii
Table of Contents	v
Table of Authorities	vi
Citations to Opinions Below	vii
Jurisdictional Statement	1
Statement of the Case	2
Summary of Argument	9
Argument	10
I. The Decision Below Applies Established Precedent to the Specific Facts of this Case	10
II. There is no Genuine Conflict Among the Circuits	12
III. Review by this Court is Neither Appropriate nor Necessary	15
Conclusion	16

TABLE OF AUTHORITIES

Page

Cases:

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975) 10,11,12

Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979) *Rehearing en banc,* 619 F.2d 459 (5th Cir. 1980), *aff'd,* 452 U.S. 89 (1981) 12,13,14,15

Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979) 13,14

Cleveland Newspaper Guild v. The Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir. 1988) (*en banc*), pet. for cert. filed, 56 U.S.L.W. 3806 (No. 87-1864) 13

EEOC v. Mistletoe Express Service, ____ F.Supp. ____, 45 FEP 777 (S.D. Tex. 1987) 10

Gifford v. Atchison, Topeka & Santa Fe Railroad, 685 F.2d 1149 (9th Cir. 1982) 12,13,14

Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), *cert. den.*, 470 U.S. 1028 (1985) 13

Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984) 12,13,14

Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985), *cert. den.*, 475 U.S. 1050 (1986) ... 13

Lacy v. Chrysler Corporation, 533 F.2d 353 (8th Cir.) *cert. den.*, 429 U.S. 959 (1976) 7

Mosely v. General Motors Corp., 497 F.Supp. 583 (E.D. Mo. 1980) 2,3,8

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Rozen v. District of Columbia, 702 F.2d 1202 (D.C. Cir. 1983) 12,13,15

Tuft v. McDonnell-Douglas Corp., 517 F.2d 1301 (8th Cir. 1975), *cert. den.*, 423 U.S. 1052 (1976) 7

Waddell v. Small Tube Products, Inc., 799 F.2d 67 (3rd Cir. 1986) 13,16

Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987) 13

Statutes:

28 U.S.C. §1254(1) 1

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 ..... *passim*

Age Discrimination Claims Assistance Act of 1988, P.L. 100-283 16

Citations to Opinions Below

Respondent adopts the Petitioner's recitation of opinions below.

No. 88-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARREN GARRETT,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

The judgment of the District Court of the Eastern District of Missouri, Eastern Division was filed on April 24, 1987. The judgment of the Eighth Circuit Court of Appeals was filed on April 14, 1988. A petition for rehearing was filed and subsequently denied on May 20, 1988. The Petition for a Writ of Certiorari was filed on August 8, 1988. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This Title VII case is based on a race discrimination charge which Petitioner Warren Garrett filed with the EEOC in October 1970, almost eighteen years ago.[1] That charge alleged that certain terms and conditions of Garrett's employment with Respondent General Motors Corporation, (hereinafter sometimes referred to as "G.M.") were discriminatory. In 1971, the year after the charge was filed, Garrett was discharged from his employment with G.M. for participation in a wildcat strike in contravention of the contract between G.M. and Garrett's Union, the United Auto Workers. Garrett never amended his EEOC charge to allege that his discharge was racially motivated.

Garrett alleged his discharge on March 29, 1971 was in violation of Title VII. G.M. has a progressive discipline policy, and because Garrett was already at the final step of that policy, he would have been discharged for any disciplinary violation. (T.276, 286). As was specifically found in *Mosley v. General Motors Corporation,* 497 F.Supp. 583, 589 (E.D. Mo. 1980),

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[1] The only record of the charge is the charge control ledger produced by the EEOC. The actual EEOC records were destroyed between March 1976 and March 1979, and G.M. did not retain its complete EEOC file regarding Garrett after being notified by the EEOC that Garrett's file was closed. EEOC records do not indicate the filing of a second charge in March 1971, even though the purported charge was produced at trial. Garrett also filed a complaint of discrimination with the St. Louis Council on Human Relations on March 18, 1971. (T.63-65; and G.M. Exhibit Q). Garrett admitted receiving a letter from the St. Louis Council on Human Relations sometime in 1974 stating that their investigation revealed no discrimination. (T.64-65; G.M. Exhibit R).

G.M. was free to discipline the employees who engaged in the wildcat strike.[2]

From June of 1970 through March of 1971, Garrett was tardy eleven times. (G.M. Exhibit N). Garrett was disciplined for being tardy the ninth time, on January 28, 1971. (G.M. Exhibit C; T.88). Garrett was unable to recall, because of the sixteen years that had elapsed from the date of these events and the date of trial the circumstances surrounding his tardiness or discipline imposed. (T.88-89).

Garrett also had a horrendous absentee record. According to Garrett's absence record, he was absent ten times between June of 1970 and February of 1971. (G.M. Exhibit M). On March 11, 1970, the eleventh (11th) time he was absent, Garrett was given a written reprimand for being absent from work without reasonable cause. (G.M. Exhibit C; T.92-95). On the following day, March 12, 1970, Garrett received a suspension for the balance of the shift plus one day for being late to work. (G.M. Exhibit C; T.93-94).

In June of 1970, Garrett was suspended for the balance of the shift plus three days for using abusive language to a supervisor. (G.M. Exhibt C). Garrett admitted that in this incident had had a knife in his hand and that he got upset with his foreman. (T.96-97). On December 22, 1970, Garrett was suspended for the balance of the shift plus one week for being under the influence of alcohol and for using vulgar language. (G.M. Exhibit C; T.98-99). Garrett admitted that he drank alcohol during his lunch period, and that he yelled at his foreman. (T.99-100).

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[2] The plaintiffs in *Mosley* had not similarly reached the last level in the disciplinary process. While the District Court did indicate that G.M. was collaterally estopped by *Mosley*, it is clear from the decision that the statement was used only in the context of discussing the second element of laches, prejudice to the defendant. (App. p. 32a) (T.291-293; G.M. Exhibits HH-1 - HH-126).

On January 28, 1971, Garrett was suspended for the balance of the shift plus two weeks for being late to work. (G.M. Exhibit C; T.101-102). On March 17, 1971, Garrett was suspended for the balance of the shift plus thirty days for leaving the plant without permission. (G.M. Exhibit C; T.103). Garrett admitted that he left the plant without permission and was disciplined. (T.103-104). Prior to leaving the plant, Garrett was stopped by a security guard and instructed to return to his job. (G.M. Exhibit C; T.105).

On March 29, 1971, Garrett was discharged for participating in an unauthorized work stoppage. (G.M. Exhibit C; T.107). Garrett admitted that he participated in the unauthorized work stoppage. (T.107-108).

Garrett's discipline record indicate that from June of 1970 through March of 1971, he was disciplined six times in a progressive manner. (G.M. Exhibit C; T.284-285). Garrett's discharge on March 29, 1971 was the seventh disciplinary action taken against him in a nine month period. (T.284-85). Furthermore, according to the progressive discipline policy, when an employee is at the sixth and final step of discipline, any rule violation can be the basis for the employee's discharge. (T.286).

The District Court found that from the time of his discharge in 1971 until 1980, Garrett made no active inquiry into the status of his charge, though during most of this period he could have requested a right-to-sue letter from the EEOC and filed suit against G.M. He had even contacted several private attorneys about his case, and each instructed him to request a right-to-sue letter. (T.82-83). By 1979 at the latest, eight years after the charge had been filed, the EEOC destroyed Garrett's charge file in accordance with its internal procedures. Garrett inquired about his charge in 1980 in response to a newspaper article; the EEOC told him that his file had been destroyed and there was nothing further the EEOC could do. (T.75). Sometime between September and October of 1982, after G.M. had been in-

formed by the EEOC that the case was closed and the file destroyed, G.M. decided not to retain closed records over ten years old. (T.346). Those files were purged to conserve space. (T.348). Included were records pertaining to Mr. Garrett, including information in connection with each particular disciplinary matter. (T.346-47). The records would also have included interviews with supervisors and anyone that might have had direct contact with the particular disciplinary matter, the notice of discipline, a fact sheet completed by the foreman, and notes from the disciplinary interview conducted by the labor relations representative with all the information he was able to obtain in the interview. (T.347).

Garrett did not contact the EEOC between 1980 and 1983. In late 1983, Garrett again contacted the EEOC, this time to determine whether he was covered by a national settlement agreement negotiated by G.M. and the EEOC. After several years during which the EEOC attempted to determine whether Garrett was covered by the settlement agreement and whether it had ever sent a right-to-sue letter to Garrett, a new right-to-sue letter was issued in July 1985. An earlier right-to-sue letter, however, may very well have been sent as early as 1972.

Two representative from the EEOC attempted to reconstruct at trial the EEOC handling of Garrett's charge. The charge control ledger and the case control ledger were the only documents which the EEOC retained concerning Garrett's charge. (*See* G.M. Exhibit T and U). The EEOC admitted that from 1976 through 1983, both the case control ledger and the charge control ledger indicated that there was absolutely no activity on Garrett's charge. (T.205). Furthermore, if Garrett had called the EEOC to find out the status of his charge from 1976 through 1983 and the EEOC personnel checked the charge control ledger, they would know that the file was closed. (T.205-07). When G.M. inquired concerning the status of Garrett's charge on January 20, 1980, it was informed that the file was closed and destroyed. (T.209-11, 242-3; G.M. Exhibit W).

Once G.M. was notified of the closure of the file, it was no longer obligated to keep the documents relevant to Garrett's charge. (T.242-43).

An EEOC representative from the Office of Congressional Affairs wrote a letter dated March 20, 1984, to Congressman William Clay informing him that there was an unsuccessful conciliation of Garrett's charge, and that Garrett had, in fact, been issued an earlier right-to-sue letter. (T.200; G.M. Exhibit Y).

The EEOC, in a letter addressed to Garrett dated June 21, 1984, stated that due to the time elapsed, their research on whether he was issued a right-to-sue letter was inconclusive. (T.213-14; G.M. Exhibit Z). Because Garrett's EEOC file was destroyed, the information concerning Garrett's charge was based upon supposition. (T.218). The EEOC could not determine whether or not Garrett had been issued a right-to-sue letter. (T.218).

Garrett's file was sent to the EEOC records center in March of 1976. (T.204-04). According to the EEOC representative testifying before the District Court, it was the standard procedure of the EEOC to send a file to the records center only after the final EEOC actions have been taken. (T.204). Moreover, it was the general practice of the EEOC to notify the charging party that the final actions have been taken regarding the charge. (T.205).

Making matter more complex, another representative of the EEOC testified that the EEOC has used a two and three letter system for notifying charging parties concerning the status of their charges. (T.146-57). The first letter is identical under both of these systems. (T.147). It informs the charging party that conciliation efforts by the commission have failed and that if 180 days have expired, the charging party may request a right-to-sue letter. (T.147). It was the standard practice of the EEOC to issue the first letter after conciliation efforts had failed. (T.148).

Under the procedure utilized in 1972 and 1973, Garrett should have been issued the first letter notifying him that conciliation efforts had failed and that he could request a right-to-sue letter with 180 days of filing his charge. (T.149), 151). Garrett acknowledged that he received this letter. (T.73). Garrett also admitted that he received "quite a few letters from the EEOC," but could not specifically say what they were. (T.73).

Prior to the 1972 amendment to Title VII, the EEOC did not have the power to file suit on behalf of a charging party. Consequently, a notification by the commission that conciliation efforts had failed constituted a right-to-sue letter.[3] Neither representative from the EEOC knew under which procedure Garrett received his notice that conciliation efforts had failed. (T.202, 245-47). If Garrett had been issued that type of letter from the EEOC stating that conciliation efforts had failed, that letter would have been destroyed by the EEOC in 1979 when Garrett's file was destroyed. (T.202-03).

It was also the normal practice for the EEOC, under the three letter system used after 1973 to issue a right-to-sue letter after a file had been rejected for litigation by the EEOC. (T.151-52). It is undisputed, however, that the EEOC did not ultimately take Garrett's case to litigation. If Garrett had been sent a letter rejecting his case for litigation and a right-to-sue letter, a copy of each letter would have been kept in the EEOC file until it was destroyed. (T.158). The receipt of the letter rejecting his case for litigation would begin the ninety day period for filing suit under Title VII. *Lacy v. Chrysler Corporation,* 533 F.2d 353, 360-1 (8th Cir.), *cert. denied,* 429 U.S. 959 (1976). Thus, regardless of the system used, it was probable that an earlier right-to-sue letter had been sent. (App. at 25a).

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[3] *Tuft v. McDonnell Douglas Corporation,* 517 F.2d 1301, 1305 (8th Cir. 1975).

Garrett filed this suit on September 11, 1985, approximately fourteen years after his discharge and fifteen years after his charge had been filed with the EEOC. The complaint alleged, among other things, that Garrett had been discriminatorily discharged from G.M.'s employ; the District Court held that the unamended EEOC charge was broadly enough worded to support the discharge claim.

However, the District Court dismissed the action on the grounds of laches, holding that Garrett had unreasonably delayed filing suit, to the detriment of G.M. In particular, the court noted that Garrett might have been sent a right-to-sue letter sometime in the 1970's, that it was impossible to resolve this issue because of the passage of time, and that Garrett's delay therefore prejudiced a probable statute of limitations defense. (App. at 25a-33a).

On appeal, the Eighth Circuit Court of Appeals unanimously affirmed the District Court's decision. The panel considered and rejected Garrett's argument that a Title VII plaintiff has the absolute right to await the administrative processing of this EEOC charge before filing suit, no matter how long that processing takes and regardless of whether the plaintiff ever investigated the status of his charge. The panel also upheld the District Court's finding that laches applied to the circumstances of Garrett's case. Contrary to Petitioner's suggestion, the Court of Appeals "declined to reach" the question concerning collateral estoppel and the *Mosley* case. (App. at 14a)

SUMMARY OF ARGUMENT

It is well established that laches may be utilized as a defense in a Title VII suit brought by a private plaintiff. Petitioner's suggestions that laches never be applied when the delay is caused by the EEOC would, as a practical matter, destroy the use of laches. The only unregulated time period, and therefore the only time period amenable to laches analysis, is the time frame occasioned by EEOC processes. Moreover, application of laches to private individuals would not, contrary to Petitioner's claims, interfere with the legitimate investigative functioning of the EEOC, as the doctrine is applied only in cases of "unreasonable" delay.

The application of laches is decidedly fact-based. It is the fact based nature of laches that is reflected in the divergent results reached by the various circuits. No circuit has adopted the absolute rule suggested by Petitioner, and no true conflict among the circuits exist.

This question arises too infrequently for consideration by this court. Moreover, if delays caused by the EEOC causes a substantial burden and is truly considered a widespread concern, it is more appropriately dealt with by congressional, not judicial, action.

ARGUMENT

I. The Decision Below Applies Established Precedent to the Specific Facts of this Case.

Petitioner suggests that review by this Court is required because certain Supreme Court cases are "implicated." While it is true that the goals of these cases are implicated, the decision of the Eighth Circuit is entirely consistent with those goals, while the result sought by Petitioner is inconsistent.

It is well settled that the doctrine of laches may be invoked as a defense in a Title VII action. *See, Albemarle Paper Company v. Moody,* 422 U.S. 405, 424-5 (1975); *Occidental Life Insurance Company of California v. EEOC,* 432 U.S. 355, 373 (1977). This is true even when the plaintiff is a private party. *Id.*

Adoption of Petitioner's position would, as a practical matter, completely remove laches as a defense against private plaintiffs. Under Title VII, the time period during which the EEOC investigates and reviews a charge is not limited by the Act. *Id.* The three hundred day period in which a charge must be filed and the 90 day period following receipt of the right-to-sue letter during which suit must be brought are reviewed under tolling analysis. In addition, application of laches is not feasible when dealing with such short periods of time. As noted in *EEOC v. Mistletoe Express Service,* ____ F.Supp. ____, 45 FEP 777, n. 1 (S.D. Tex. 1987), there have been no reported cases in which laches was applied where the suit was commenced less than two years after filing of the charge. Thus, as a practical matter, adoption of Petitioner's position is the functional equivalent of overruling this Court acceptance of laches in *Albemarle* and *Occidental.*

Petitioner argues that the goals of Title VII are thwarted by the application of laches to a private plaintiff who has waited 15 years for the EEOC to complete processing his charge before bringing suit. These generalized goals, however, do not compel

review by this court. In *Albemarle,* this court recognized that, "on these issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." *Id.* at 425.

The particularized goal of protecting the EEOC as primary enforcer of Title VII does not warrant the establishment of an absolute right of a private plaintiff to await completion of EEOC processes before requesting a right-to-sue letter. In fact, that goal would seem to suggest the opposite. If the EEOC is the primary enforcer of Title VII and it is permissible to apply laches to it, it is equally permissible to apply laches to a private plaintiff, as a secondary enforcer, for the very same delay. The EEOC's right to proceed, in any given matter, is certainly not less than private individuals. *See, Occidental Life Insurance Co. of California v. EEOC,* 432 U.S. 355, 373 (1977).

Moreover, this case does not factually present a situation in which the processes were continuing and any delay was attributable to the EEOC's workload. On the contrary, the EEOC had long since ceased investigating the claim, closed the matter, and destroyed the file. From the EEOC's perspective, its role had been complete for almost ten years prior to suit being brought.

One recurrent principle found in this court's pronouncements is the need to allow lower courts "discretionary power 'to locate a "just result" in light of the circumstances peculiar to case'." *Occidental Life Insurance Co. of California v. EEOC,* 432 U.S. 355, 373 (1977), citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424-425 (1975). The trial court in this case did just that. After a full trial, the judge concluded that the plaintiff had not exercised due diligence in following the status of his EEOC charge. Under normal circumstances he would already had been issued a right-to-sue letter as many as ten years before he brought suit, and the files were destroyed by the EEOC over six years before he brought suit. Thus, the existence of an earlier

right-to-sue letter could not be proven. Therefore, the decision in this case is quite unique. The question presented was not merely if plaintiff had the absolute right to not request a right-to-sue letter during the pendency of the EEOC process, but if this plaintiff had ever in fact received an earlier right-to-sue letter.

Unlike the majority of cases cited by Petitioner, this case does not involve good faith reliance on continued assurances by the EEOC of an ongoing and active investigation[4] or destruction of documents attributable to defendant.[5] In fact, the District Court found that Petitioner's contact with the EEOC during his 15 year wait was minimal, and that it was the EEOC that destroyed the file. Respondent was told by the EEOC three (3) years prior to the suit that the matter had been closed, a right-to-sue letter issued, and that the file had been destroyed. This same information was also given by the EEOC to the Petitioner's United States Congressman. This unique factual scenario was properly analyzed "in light of the circumstances peculiar to the case" as suggested in *Occidental* and *Albemarle*. The writ should not be granted merely to review the District Court's application of the mandate of *Occidental* and *Albemarle* to the specific and unique facts of this case.

II. There is no Genuine Conflict Among the Circuits.

Every Circuit reaching the question has held that the defense of laches is available in Title VII suits brought by private plain-

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[4] *See, Rozen v. District of Columbia*, 702 F.2d 1202 (D.C. Cir. 1983); *Gifford v. Atchison, Topeka and Santa Fe Railroad Co.*, 685 F.2d 1149 (9th Cir. 1982).

[5] *See, Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984); *Rozen v. District of Columbia*, 702 F.2d 1202 (D.C. Cir. 1983).

tiffs.[6] Also universally accepted is the notion that the determination of laches is heavily fact based, reviewed according to the specific facts of each case. *Gifford v. Atchison Topeka & Santa Fe Railroad Co.*, 685 F.2d 1149, 1152 (9th Cir. 1982).

Petitioner's characterization of the holdings of the Fourth, Fifth, Ninth, Eleventh and District of Columbia Circuits as necessarily in conflict with those of the Sixth, Seventh and Eighth[7] Circuits is incorrect. Petitioner has taken phrases used to characterize behavior in a given case and imbued them with universal applicability. In fact, the different results reached in these circuits are a reflection of specific facts and not the application of different law.

The Fourth Circuit, in *Holsey v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984) merely noted that the "[The plaintiff's] decision to rely on the Commission's administrative process before initiating a private suit is not inexcusable delay." The terse holding was limited by its very terms to the decision of that plaintiff.

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[6] *See, Waddell v. Small Tube Products, Inc.*, 799 F.2d 69 (3rd Cir. 1986); *Holsey v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984); *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1256 (5th Cir. 1979), aff'd on other grounds, 452 U.S. 89 (1981); *Cleveland Newspaper Guild v. Plain Dealer Publishing Co.*, 839 F.2d 1147 (6th Cir. 1988) (en banc), pet. for cert. filed 56 U.S.L.W. 3806 (No. 87-1864); *Jeffries v. Chicago Transit Authority*, 770 F.2d 676 (7th Cir. 1985) cert. den. 475 U.S. 1050 (1986); *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 244-5 (8th Cir. 1987); *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1532 (11th Cir. 1984); *Rozen v. District of Columbia*, 702 F.2d 1201, 1203 (D.C. Cir. 1983).

[7] Petitioner failed to note the holding of the Third Circuit as consistent with the Sixth, Seventh and Eighth Circuits. *Waddell v. Small Tube Products*, 799 F.2d 69 (3rd Cir. 1986).

The Fifth Circuit, in *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979), faced the issue in the context of ruling on a motion for summary judgment. The court refused to apply the doctrine of laches, "because the facts as presented on this summary judgment motion, without more, do not allow a finding of laches." The court nonetheless continued to discuss the second element of laches, prejudice to defendants, and reasoned that any prejudice to defendants was in fact, attributable to the defendants, not the plaintiff. The court closed discussion of the issue by stating:

> "We conclude that the present facts do not allow findings of either unreasonable delay or prejudice." *Id.*

The Ninth Circuit serves as an excellent example of the fact based nature of laches. In *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979), the court held that a plaintiff does not have an absolute right to await completion of EEOC processes before seeking a right-to-sue letter, and applied laches to a private plaintiff's Title VII suit. In *Gifford v. Atchison, Topeka and Santa Fe Railroad Co.*, 685 F.2d 1149 (9th Cir. 1982), the court was faced with the denial of a summary judgment motion. In sharp contrast to the facts of the instant case, the court noted that in opposing the motion for summary judgment "plaintiff's attorney submitted an extensive affidavit . . . detailing repeated and continuous efforts of plaintiff and her attorneys to monitor the progress of her charge through the EEOC." (*Id.* at 1152). The court concluded that "there are material factual issues to be resolved." (*Id.*). It can hardly be said that the Ninth Circuit recognizes, as Petitioners suggest, an absolute right to await completion of administrative processes.

The Eleventh Circuit, in *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984), similarly refused to establish any such absolute right. The court noted that there were "exceptions" to the rule that plaintiffs should normally be allowed to wait for termination of the EEOC's process before filing suit,

but declined "to make an exception in this case." *Id.* Interestingly, just as in *Bernard,* the court proceeded to review the element of prejudice to the defendant, and concluded that any prejudice was attributable solely to defendant.

The last case Petitioner relies on is *Rozen v. District of Columbia,* 701 F.2d 1202 (D.C. Cir. 1983). In *Rozen,* the D.C. Circuit considered in detail the record of the plaintiff's dealing with the EEOC, and held only that under the circumstances, the plaintiff was not unreasonable in waiting. The court concluded that the steps taken by the plaintiff to pursue his claim "sufficiently rebuts any inference that Rozen was content to 'sleep on his rights'." *Id* at 1204. In addition, the court noted defendant's failure to prove any prejudice. Such a detailed factual analysis does not indicate a view of the law different from that of the Eighth Circuit in the instant case.

Rather than an actual difference of opinion of the law of laches amongst the circuits, the different results appear to arise solely because of the facts of each case and the manner in which the case is presented. No true conflict exists.

III. Review by this Court is Neither Appropriate nor Necessary.

Petitioners seek to establish an absolute rule that a plaintiff may wait forever for the EEOC to complete its investigative processes prior to bringing suit. This position has not been adopted by any circuits. Respondent merely suggests that a plaintiff may not wait an unreasonable period of time and thereby fail to fulfill the duty to exercise due diligence. As the cases indicate, there are times when reliance on the EEOC is reasonable, and there are other times, admittedly more rare, when the wait is not reasonable. As the Third Circuit noted in reviewing all of the cases:

> "In sum, although plaintiffs have some obligation to monitor the progress of their charge and do not have the absolute right to await termination of EEOC proceedings

where it would appear to a reasonable person that no administrative resolution will be forthcoming, whether the circumstances warranted the delay in a particular case requires an ad hoc determination." *Waddell* at p. 77

The attempt by Petitioners to remove the trier of fact's discretionary power to "locate a just result" should be avoided. At the very least, the infrequency with which this question arises should indicate that review by this court is unnecessary.

Additionally, resolution of this matter should more appropriately be made by Congress. Petitioner notes recent passage of an analogous law, the Age Discrimination Claims Assistance Act of 1988, P.L. 100-283, specifically aimed at relieving individuals of the burdens caused by delays in EEOC processing. Any similar burden imposed on Title VII plaintiffs because of EEOC delays could be similarly, and more appropriately, addressed by Congress.

CONCLUSION

The Petition for A Writ of Certiorari should be denied.

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